Petition

81-1147

NO.

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In the Supreme Court of the United States

OCTOBER TERM 1981

JOSE ELIBARDO LERMA,
Petitioner

V.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

PENA, McDONALD, PRESTIA & IBANEZ
L. ARON PENA
P.O. Box 54
Edinburg, Texas 78539
(512) 383-5311

ATTORNEY FOR PETITIONER

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

Whether the admission by the trial court, over objection of the accused, of testimony regarding an irrelevant and extraneous offense was so prejudicial as to deny Petitioner a fair trial.

TABLE OF CONTENTS

Question Presented For Review i

Opinion Below 2

Jurisdiction 2

Constitutional Provision Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

Conclusion 5

Certificate of Service 7

Appendix A (Full Opinion of Fifth Circuit)

Appendix B (Extract of Reporter's Notes)

Appendix C (Extract of Appellee's Brief)

Appendix D (Extract of Reporter's Notes)

TABLE OF AUTHORITIES

U.S. CONSTITUTION:
Fifth Amendment 5
Sixth Amendment 5

STATUTES & RULES:

Rules 404 & 403, FRE 4

CASES:

U.S. v. Renteria, 625 F.2nd 1279
(CA 5th 1980) 5

U.S. v. Krezdorn, 639 F.2nd 1327
(CA 5th 1981) 5

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SUPREME COURT OF THE UNITED STATES
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No._____

JOSE ELIBARDO LERMA,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Jose Elibardo Lerma, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered September 30, 1981.

OPINION BELOW

The opinion of the United States Court of Appeals or the Fifth Circuit affirming the conviction will be reported in the F.2d Reporter. A copy of said opinion is attached hereto as Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit (Unit A) entered a judgment affirming the conviction in this cause on September 30, 1981. Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1), and Rule 17, U.S. Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the Constitution provides in part that "In all criminal prosecutions, the accused . . . shall be informed of the nature and cause of the accusation . . . and to have the assistance of counsel for his defense." The Fifth Amendment further provides that no person shall be deprived of liberty without due process of law.

STATEMENT OF THE CASE

In a close factual question of guilt (See Opinion Headnote 5) the trial court, over strenuous objection from Petitioner, allowed Government evidence of Petitioner's actual commission of a subsequent and extraneous offense without possible relevance. Petitioner's arrest at his place of employment came on a bench warrant from an indictment returned approximately one year subsequent to the alleged offense. The arrest came without incident, but Petitioner was found in possession of a deadly weapon. The Prosecution deliberately brought such fact to the jury's attention. Information was obtained from Petitioner at the time of arrest, but nothing so prejudicial to the guilt or innocence of Petitioner on the pending charge as the carrying of a firearm! Although counsel for Petitioner questioned the relevancy, the Government offered no explanation or connection. Nevertheless, the trial court ruled it admissible and the jury dwelled on the same.

The jury, after much deliberation, found Petitioner guilty, and a penitentiary sentence was assessed by the trial court.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has here rendered a decision which not only shows a clear conflict with the dictates of the Federal Rules of Evidence, (Rule 404(b) & 403), but such a decision is a departure from other established decisions of this and other federal courts of appeal.

The admission of such evidence, the Government contends, was harmless because it is a Class A Misdemeanor in Texas. (See Appendix C from Appellee's Brief) What about the many, many possible federal law violations, and the prevalent fear of firearms by the general public!

The Court of Appeals dismisses the possible error because Petitioner's lawyer persisted in its mention on cross-examination. A defendant cannot be prejudiced for attempting to minimize the unfair harm from Government's error! Counsel for Petitioner simply asked if State law didn't allow travelers and businessmen to carry firearms. (SF 245).

The Appellate Court also believes the trial judge's turnabout with a later instruction to the jury that the gun was not involved in the case . . . and was

not to be used against him." He in effect told the jury not to smell the skunk . . . after the court let it in! (SF 220).

The above not only contradicts precedent and the Rules of Evidence, but controverts basic constitutional guarantees. (Amendments 5 & 6); *(U.S. v. Renteria, 625 F.2nd 1279 (CA 5th 1980); and U.S. v. Krezdorn, 639 F.2nd 1327 (CA 5th 1981).* Defendant was entitled to be informed of the exact charge he was to defend against, and thereby have the effective assistance of counsel. Petitioner was not indicted for being a criminal generally!

The Fifth Circuit in this case would allow all evidence of other crimes during the lapse of time from the date of an offense to the time of the arrest, regardless of how remote the events may be. It should be corrected to follow the clear provisions of the Rules of Evidence.

CONCLUSION

WHEREFORE, premises considered, Petitioner prays this Honorable Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

PENA, McDONALD, PRESTIA
& IBANEZ
P. O. Box 54
Edinburg, Texas 78539

L. Aron Pena
Bar No. 15739000

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this court, certifies that pursuant to Rule 33, Supreme Court Rules, he served the Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit on the counsel for Respondent by enclosing a copy thereof in an envelope, postage addressed to:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

and depositing same in the United States mails at Edinburg, Texas, on November 9, 1981, and further certifies that all parties required to be served have been served.

L. Aron Pena

UNITED STATES of America
Plaintiff-Appellee,

v.

Jose Elibardo LERMA,
Defendant-Appellant.

No. 81-2052
Summary Calendar.

United States Court of Appeals
Fifth Circuit
Unit A

Sept. 30, 1981

Defendant was convicted in the United States District Court for the Southern District of Texas, Filemon B. Vela, J., of conspiracy to possess marijuana with intent to distribute, possession of marijuana with intent to distribute, and using a communication facility to accomplish those offenses. Defendant appealed. The Court of Appeals, Ainsworth, Circuit Judge, held that: (1) evidence that defendant was in possession of a gun at the time of his arrest was admissible; (2) evidence that defendant was

arrested pursuant to an arrest warrant was admissible; (3) the evidence was sufficient to sustain the convictions; and (4) the omission of defendant's first name in one count of the indictment and the inclusion of an alias in all three counts did not render it so fundamentally defective so as to warrant reversal of defendant's conviction.

Affirmed.

Appeal from the United States District Court for the Southern District of Texas.

Before AINSWORTH, REAVLEY and RANDALL, Circuit Judges.

AINSWORTH, Circuit Judge:

Jose Elibardo Lerma was indicted and convicted of conspiracy to possess marijuana with intent to distribute, possession of marijuana with intent to distribute, and using a communication facility to accomplish these offenses, each a violation of the Controlled Substances Act of 1970, 21 U.S.C. §§ 841(a)(1), 843(b), 846. Lerma appeals, arguing that certain evidentiary rulings, the insufficiency of the evidence

and flaws in the indictment warrant reversal of his conviction. Finding no reversible error among these asserted defects, we affirm.

Lerma was implicated in a sale of over thirteen hundred pounds of marijuana by James Dickenson, who was arrested with the marijuana at a border checkpoint early on May 6, 1979. According to Dickenson's testimony, approximately two months earlier Dickenson and Ronald Spicer, both residents of Camden, Arkansas, had enlisted the aid of Tirzo Hernandez Garcia in a scheme to buy marijuana.[1] Garcia gave them the telephone number of a source for marijuana, whom he believed was named Pedro Villarreal. Spicer called the number and told Dickenson that someone named Joe had instructed them to come to Harlingen, Texas. At a Harlingen motel, Dickenson and Spicer met two men, one whom Dickenson later identified as the appellant Jose Elibardo Lerma. A

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1. Tirzo Hernandez Garcia was indicted for conspiracy to possess marijuana with intent to distribute and possession of marijuana with intent to distribute. He was tried jointly with Lerma and acquitted.

   Ronald Spicer a Lerma were indicted for the same three offenses, but Spicer's trial was delayed while his competency to stand trial was determined.

sale of marijuana was discussed, but not consummated because Lerma lacked the three hundred pounds Spicer then wished to acquire. Spicer and Dickenson returned to Arkansas without the marijuana.

Several weeks later, in April 1979, Dickenson testified that he was approached by Spicer and engaged to drive a truckload of marijuana from Harlingen to Camden for five hundred dollars. Dickenson accompanied Spicer to Harlingen, where they stayed for approximately twelve days. During this period, they were visited twice by a man Dickenson later identified as Lerma. A sale of eight hundred pounds of marijuana was discussed during one of these meetings. Subsequently, Spicer rented a truck and loaded it with old furniture. The truck was then turned over to Lerma and a companion. Five hours later, Spicer and Dickenson were led by Lerma to a secluded area where the truck was parked. There, Spicer paid Lerma fifty-four thousand dollars for over thirteen hundred pounds of marijuana that had been loaded in the truck. The transaction completed, Dickenson drove the truck north while Spicer led the way in his automobile. Dickenson was arrested at the Sarita checkpoint after the truck was stopped and the marijuana discovered.

Dickenson pled guilty of possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Initially, he did not implicate Spicer, Garcia, or Lerma. While incarcerated, Dickenson notified federal agents that he wished to provide them with information because his family had been threatened. From photographs, Dickenson identified Lerma as the man who hadsold Spicer the marijuana. He also identified Lerma in court. The government did not promise Dickenson any benefit in exchange for is cooperation.

At trial, the government produced managers of three Harlingen motels who verified that Spicer had registered at their motels during the periods Dickenson testified that he and Spicer were in Harlingen. The records manager of a truck rental firm testified that Spicer had rented the truck on May 1, 1979. The government also proved the making of forty-six long distance telephone calls to Lerma's residence[2] from Spicer's home or place of business between March and October of 1979. Five others were placed by Spicer to Lerma's place of employment. Thirty-seven calls were made from Lerma's residence telephone to Spicer's

2. The phone in Lerma's residence apparently was registered in the name of his brother's wife, Tomasa Villarreal, who lived in a house on the lot adjacent to Lerma's residence.

residence, and twelve others were made to his place of business. After Lerma's indictment, a warrant was issued and he was arrested by a government agent. Lerma's counsel objected at trial when the arresting agent was asked to describe what he found on Lerma's person. The objection was overruled and the agent testified that he had discovered a gun and several identifying papers. The agent also testified that after being warned of his constitutional rights, Lerma had given the agent certain personal information, including his telephone number.

[1] Lerma argues that mention of his possession of the gun was irrelevant and requires reversal ofhis conviction. His claim must be viewed within the context of the trial court's broad discretion to determine the relevancy of proffered evidence. Such discretion is reviewable only for abuse. *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981); *United States v. Welliver*, 601 F.2d 203, 210 (5th Cir. 1979). Evidence admitted by the trial court of the search incident to Lerma's lawful arrest estəblished a logical predicate to the admission of the identifying papers seized and personal information given by Lerma. Failure to prove the arrest would have left the jury to speculate how this evidence had been obtained. Lerma's possession of the gun was merely one of the cir-

cumstances of the arrest; the gun itself was not introduced in to evidence. The trial court did not overstep the bounds of its discretion by permitting evidence of the gun's seizure to be heard by the jury.

[2] Lerma further argues that the putative error in mention of the gun was compounded by the agent's opinion testimony that carrying the weapon violated state law. This opinion, however, was elicited only after persistent cross-examination by Lerma's lawyer. Any error in the admission of statements concerning the legal consequences of carrying a gun was invited by his attorney's questioning. The accepted rule regarding statements procured in this manner is that "where the injection of allegedly inadmissible evidence is attributable to action of the defense, its introduction does not constitute reversible error." *United States v. Martinez*, 604 F.2d 361, 366 (5th Cir. 1979), *cert denied*, 444 U.S. 1034, 100 S.Ct.708, 62 L.Ed.2d 671 (1980) *quoting United States v. Doran*, 564 F.2d 1176, 1177 (5th Cir. 1977), *cert denied*, 435 U.A. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978). Having deliberately pursued a strategy that created a potential error at trial, Lerma cannot seek relief from the untoward results of that strategy on appeal.

Furthermore, any conceivable prejudicial of

mention of the gun was effectively blunted by the judge's special caution to the jury that "the incident involving the gun is not involved in this case . . . That is an incidental matter that took place at the time he was taken into custody . . . you don't use it against him." *See United States v. Macker*, 608 F.2d 223, 227 (5th Cir. 1979) curative effect of cautionary instruction regarding gun).

[3] Lerma also protests that the arresting agent's testimony that he acted under a post-indictment warrant should have been excluded. Lerma theorizes that jurors would prejudicially infer guilt from issuance of an arrest warrant. His claim is without merit, however, since a warrant or the existence of an established exception to the warrant requirement is a prerequisite to the lawfulness of an arrest and search. The trial court acted properly in permitting the government to establish a foundation for the admission of Lerma's papers and post-arrest statements. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[4] Lerma next urges that the evidence is insufficient to support a conviction because Dickenson's testimony was unworthy of the jury's belief as a matter of law. Dickenson admitted once

burning a house for Spicer to collect insurance proceeds and selling and using various drugs. He also admitted that he was intoxicated when he pled guilty to possession of marijuana with intent to distribute and that he lied to the judge who accepted his plea. Defense counsel was allowed to read from the transcript of Dickenson's plea proceeding during his closing argument.

[5] In testing the sufficiency of evidence to support a conviction, we view the evidence in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). The relevant standard is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original). The jury is the ultimate arbiter of the credibility of witnesses. *United States v. Cravero*, 530 F.2d 666, 670 (5th Cir. 1976). Whether Dickenson testified truthfully was an issue for the jury. Only when testimony is so unbelievable on its face that it defies physical laws should the court intervene and declare it incredible as a matter of law. *United States v. De Los Santos*, 625 F.2d 62, 65 (5th Cir. 1980); *United States v. Palacios*, 612 F.2d 972, 973 (5th Cir. 1980); *United States v. Cravero, supra*, 530 F.2d at 670. Despite the

attack on his credibility, the jury evidently found Dickenson's testimony to be trustworthy.

Dickenson testified in detail to the complex series of events that culminated in the sale of marijuana. He identified Lerma as one of the sellers. Hotel, telephone and truck rental records tended to corroborate parts of Dickenson's story. Telephone records also linked Lerma to the scheme, confirming the existence of regular communication during the relevant period between his residence and workplace and Spicer's residence and business. With this evidence before it, the jury could rationally conclude beyond a reasonable doubt that Lerma was guilty of each offense charged.

[6] Lerma moved for a declaration of mistrial after the prosecutor, in response to an inquiry from the trial judge, explained that evidence of the arresting agent's warning to Lerma of his constitutional rights was introduced as a foundation for Lerma's subsequent "admissions." The prosecutor was referring to the personal information Lerma gave the agent. Lerma asserts that the motion to declare a mistrial was improperly denied because no evidence of admissions of guilt was adduced. Since the term "admission" can apply to a wide array of utterances by a party opponent, including Lerma's statements of per-

sonal history, Fed. R. Evid. 801(d)(2), the prosecutor's statement was accurate. Ideally, the prosecutor might have been more circumspect in his choice of language to defeat any prospect of jury confusion or prejudice. But his use of the term "admissions" once during the entire trial does not warrant reversal of the denial of Lerma's motion for mistrial, particularly in light of the court's admonition to the jury "not to look at it [Lerma's statements] as an admission in the sense of the word."

[7, 8] Finally, Lerma urges that the omission of his first name in one count of the indictment and the inclusion of an alias in all three counts render it so fundamentally defective that his conviction should be overturned. Lerma, however, failed to object to the defects he now portrays as fundamental until after the close of the prosecution's case. Lerma also incorporated the alias in his pretrial motions. Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires that objections based on defects in an indictment be raised prior to trial. Failure to comply with this requirement results in waiver of the objection. *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980), *cert. denied*, — U.S. —, 101 S.Ct. 1348, 67 L.Ed.2d 334 (1981); Fed.R.Crim.P. 12(f). No showing

of cause for relief was made, nor are the defects so pervasive that the indictment fails to charge an offense. *United States v. Trollinger*, 415 F.2d 527, 528 (5th Cir. 1969); Fed.R.Crim.P. 12(b)(2).

Even if the objection were timely, its almost trifling character falls far short of justifying reversal of the conviction. The alias included in the indictment was later excised by the trial judge. The omission of Lerma's first name in one count of the indictment, where his full middle and last name were fully stated in no way deprived him of notice of the charge or prejudiced his defense. *United States v. Rich*, 518 F.2d 980, 986 (8th Cir. 1975) *cert. denied*, 427 U.S. 907, 96 S.Ct. 3193, 49 L.Ed.2d 1200 (1976).

AFFIRMED.

Appendix B

MR. PENA: Your Honor, he is going to ask him if he had weapons on him. This is immaterial and extraneous. It has no relevance to the offense in question. And this arrest occurred over a year after the alleged offense. To admit this into evidence is not only irrelevant but it is extremely prejudicial to the rights of my client on this charge only.

THE COURT: I will allow him to ask the question. I think it is admissible.

MR. PENA: For what purposes? On what basis, if I may ask the prosection?

MR. MUSEL: I join that motion.

MR. PENA: He is not charged with being in possession of a weapon.

THE COURT: I will allow it.

MR. PENA: Note our exception, Your Honor, May we have a running objection to this?

THE COURT: Yes.

(Whereupon the following proceedings were had within the hearing of the jury:)

Q. BY MR. RAMIREZ: Mr. Morrison, when you testified that you conducted a search of Mr. Lerma, where did the search take place?

A. Right behind his vehicle, immediately after

thirty telephone calls from appellant's work and home telephones and Spicer's work, and home telephones were made after the arrest. The jury was entitled to infer conspiratorial activity and "coverup" from the calls made during the time between the arrest of Dickenson and that of appellant (T. 228-235), *cf. United States v. Posey*, 611 F.2d 1389 (5th Cir. 1980).

The evidence of the search for weapons explained how the business card and rent receipt were discovered. The admission of evidence of the recovery of the weapon was harmless, as the highest grade offense that it could have amounted to was a Class A misdemeanor. *See* § 46.02, Texas Penal Code. Appellant himself brought out that the possession of a weapon is not an offense if a person is traveling in

Texas, or traveling to a business with money. (§46.03, *supra;* T. 246), and that no charges were filed (T. 247). The only evidence of the weapon's illegality was brought out by appellant's own counsel on cross-examination when he asked whether appellant had violated the law (G.246). The court's instruction that the weapon issue was not "involved in this case" and that appellant was "not on trial for that" cured any possible harm (T.247).

Appellant contends that the prosecutor mentioned that he was arrested on a warrant from another court, and that the jury would conclude from this that the judge felt that he was guilty. The prosecutor brought out only that appellant's arrest (T. 187-9). stemmed from a post-indictment warrant of arrest (T. 216). Defense counsel elicited that the arrest was on a bench warrant after indictment by a grand jury (T. 256, 257). The court's usual instruction is that an indictment is not evidence of guilt. Common

Appendix D

Q. In fact, didn't he tell you that he had just come in from Colorado a few months ago?

A. No, he didn't.

Q. I show you this statement again which you took, Mr. Morrison, and tell the jury, please, the driver's license that he indicated that he had and where from?

A. Colorado Driver's License.

Q. All right, sir. And it expired when?

A. 7/4/81.

Q. All right, sir. Now, from your knowledge of the law, Mr. Morrison, is it illegal for a businessman who may be carrying some money to carry a weapon at 8:00 o'clock in the morning going to work?

MR. RAMIREZ: Objection, Your Honor. That calls for a legal conclusion.

THE COURT: Overruled.

A. Yes, sir.

Q. BY MR. PENA: It is illegal?

A. As far as I know.

Q. Are you familiar with the State Penal Laws?

A. No. I am a Federal agent. I am not familiar with the state laws.

Q. You don't know what the State of Texas allows